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Brief of Bruce for P. C.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 108.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

versus

T. R. EUBANK, DOING BUSINESS UNDER THE NAME OF T. R. EUBANK & CO., DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF SIMPSON COUNTY, STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

H. W. BRUCE,
WALKER D. HINES,
Counsel for Plaintiff in Error.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case is here upon a writ of error to the Simpson Circuit Court of Kentucky, which is the highest court of the State in which a decision in the suit could be had, to review the judgment of that court against the plaintiff in error (hereinafter referred to as the Railroad Company) in favor of Eubank for $188.81, the difference between the rate of 25 cents per hundred pounds charged Eubank for 145,245 pounds of tobacco shipped by him from Franklin, Kentucky, to Louisville, Kentucky, and the published rate of the Railroad Company of 12 cents per hundred pounds charged for the transportation of tobacco from Nashville, Tennessee, to Louisville, Kentucky, a longer distance over the same line of railroad, the less rate from Nashville, Tennessee, to Louisville, Kentucky, not having been authorized by the Railroad Commission of Kentucky.

The long and short haul law of the State of Kentucky is contained in Section 218 of the Constitution, which for brevity will be hereinafter referred to as "Section 218," and which reads as follows:

"It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: Provided, That upon application to the Railroad Commission, such common carrier, or person, or

corporation owning or operating a railroad in this State, may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operation of this section."

Section 820, Kentucky Statutes, makes it a misdemeanor to violate the constitutional prohibition, but has no bearing upon civil actions, and needs no further reference here.

The Railroad Company demurred specially to Eubank's petition, on the ground that the court was without jurisdiction with respect to the rate from Nashville to Louisville, exclusive jurisdiction in regard thereto being vested by Section 9 of the Interstate Commerce Act, in the Interstate Commerce Commission or a district or circuit court of the United States, and demurred generally to the petition, because it failed to state facts sufficient to constitute a cause of action; and because the laws of Kentucky, if so construed as to be applicable to the rate from Nashville to Louisville, would be a regulation of interstate commerce, and, therefore, void. The Court overruled the demurrers.

Thereupon the Railroad Company filed an answer in four paragraphs. Paragraph 1 admitted the rates from Nashville and Franklin and shipments from Franklin substantially as alleged in the petition.

In paragraph 2 the Railroad Company alleged that its 12-cent rate from Nashville to Louisville was made under and in conformity with the Interstate Commerce Act, and in pursuance of Section 6 of that act was duly printed, posted and kept open to public inspection, and was duly filed with the Interstate Commerce Commission, and that by virtue of that act it would have been unlawful for the defendant to have charged either more or less than 12 cents per hundred pounds on tobacco from Nashville to Louisville; that if the laws of Kentucky were so construed as to make its rate of 25 cents per hundred pounds on tobacco from Franklin to Louisville unlawful, by reason of the less rate from Nashville to Louisville, the result would be to regulate commerce among the States by the long and short haul laws of Kentucky, and to compel the defendant to, and it would, raise its rate of 12 cents per hundred pounds from Nashville to Louisville, unless it obtained authority from the Railroad Commission of Kentucky to charge the less rate from Nashville to Louisville, and that thereby the long and short haul laws of Kentucky would be in conflict with and repugnant to the Interstate Commerce Act and the Constitution of the United States. The court sustained a demurrer to paragraph 2.

Paragraph 3 pleaded the two years' statute of limitations with respect to a portion of the plaintiff's claim. It involved no Federal question. The court sustained a demurrer to this paragraph.

In paragraph 4 the Railroad Company alleged that its rate from Franklin to Louisville was just and reasonable; that the lower rate from Nashville was necessitated by water competition at Nashville; that its transporting tobacco at the lower rate from Nashville did not

increase the rate charged from Franklin to Louisville or give Nashville any advantage over Franklin, and was of value to the Railroad Company. After alleging the Railroad Company's charter contract right to operate a railroad and engage in all manner of legitimate railroad business in the State of Kentucky, this paragraph alleged that the Railroad Company's engaging in the tobacco business between Nashville and Louisville at the rate it was compelled to charge therefor was a legitimate railroad business, and not injurious to any person, and that if the laws of Kentucky were so construed as to require it either to withdraw from that business or to reduce all other rates on tobacco to Louisville from points between Nashville and Louisville to the same low basis, regardless of any inquiry as to their reasonableness, and when in fact they were reasonable, saving only an arbitrary and final power in the Railroad Commission of Kentucky, not subject to judicial review, to relieve from the operation of such requirement, such laws would be an arbitrary interference with the Railroad Company's legitimate business, not promoting, or tending to promote, or in any wise related to or connected with, the general welfare of the State, or any person in the State, and would, therefore, impair the obligation of the Railroad Company's contract with the Commonwealth of Kentucky, and would deprive the Railroad Company of the right to use its property, and its property itself, without due process of law, and deny to it the equal protection of the law. It was also alleged that the law of Kentucky, so construed, would necessarily involve an unlawful interference with commerce between the States, in conflict with the Constitution of the United States, and with the Interstate Commerce Act. The court sustained a demurrer to Paragraph 4.

A reply was filed traversing some minor matters in the first paragraph of the answer, and thereupon, upon Eubank's motion and over the objection of the Railroad Company, the court upon the pleadings and exhibits awarded Eubank judgment against the Railroad Company for $188.81 and costs. This judgment was rendered without allegation or proof that Eubank had sustained any damage, and when in fact he had paid only a reasonable rate; without any showing that he would have obtained any less rate if the law as construed by the Court of Appeals had been complied with; when even according to that construction Eubank would have had absolutely no right to compel a reduction in his rate, since the Railroad Company had the right to comply with the law as well by raising the long-haul rate as by lowering the short-haul rate; and when it appeared without dispute that the Railroad Company would have complied with the law, if it had understood that law to be applicable, by increasing the long-haul rate. In other words, while according to the lower court's construction there was a technical violation of the law on the part of the Railroad Company, there was nothing whatever to show that that violation had in any wise affected Eubank's status, or put him in any worse position than he would have occupied if the law had been complied with. Thus the court awarded Eubank a judgment in a private

action on account of a public offense, although there was not the remotest suggestion of special injury sustained by him.

We contend that the court erred in overruling the special and general demurrers to the petition; in sustaining demurrers to paragraphs 2 and 4 of the answer, and in giving judgment for the plaintiff, thereby enforcing Section 218 when so construed as to make it a regulation of interstate commerce, and, in addition, an arbitrary interference with the Railroad Company's contract rights, and with its rights under the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

I.

As applied by the lower court, Section 218 prohibits charging more on tobacco from Franklin, Ky., to Louisville, Ky., than from Nashville, Tenn., to Louisville, Ky., unless the Railroad Commission of Kentucky shall authorize the less rate from Nashville to Louisville. Such application of the provision is in direct contravention of the commerce clause of the Federal Constitution, and is even more obnoxious thereto than was the Illinois statute condemned in Wabash, &c., R. Co. v. Illinois, 118 U. S. 557, for that statute only purported to operate upon that portion of the interstate rate which actually accrued within the State, while here the entire rate from Nashville to Louisville is regulated by the Kentucky law and put under the dominion of the Railroad Commission of Kentucky. Moreover, when the Illinois case just referred to arose, Congress had never legislated relative to interstate rates, while before this case arose Congress had controlled that whole subject by the Interstate Commerce Act; the very rate from Nashville, Tenn., to Louisville, Ky., which it was contended could not be charged without authority from the Railroad Commission of Kentucky, was established in accordance with the Interstate Commerce Act, and by virtue of that act it would have been unlawful for the Railroad Company to have charged either more or less than the rate thus duly established. Gulf, &c., R. Co. v. Hefley, 158 U. S. 98. The rate from Nashville to Louisville being an interstate rate, must besides, bear a due and proper relation to other interstate rates, so as to work no undue preference under the Interstate Commerce Act. Its proper adjustment under the Act of Congress would be hopelessly hampered if it must also be adjusted with reference to the laws of Kentucky, and, of course, the Tennessee laws would have an equal application thereto.

The lower court seemed to proceed upon the theory that Sec. 218 operated solely upon the intra-state rate from Franklin, Ky., to Louisville, Ky., and simply made that rate unlawful if it exceeded the rate for the longer distance over the same line in the same direction, including the distance from Franklin, Ky., to Louisville, Ky., and that therefore there was no regulation of interstate commerce, even though

one of the longer distance points, or, for that matter, both of them, should be outside of the State of Kentucky.

No such theory can get around the practical regulation of interstate commerce which results from its application, or elude the principles established by this Court in the Illinois case in 118 U. S. just cited. In that case this Court said:

"But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. . . . It was to meet just such a case that the commercial clause in the Constitution was adopted. . . .

"It can not be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it that the commerce clause was intended to secure. This clause giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. Cook v. Pennsylvania, 97 U. S. 566, 574; Brown v. Maryland, 12 Wheat. 419, 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce. . . .

"Let us see precisely what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, 'I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous

track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery.' So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria.

"So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a car load, but is compelled to pay at the rate of twenty-five cents per hundred pounds, because the railroad company has received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a car load of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois in its endeavor to prevent unjust discrimination, as construed by the Supreme Court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York."

If the Railroad Company can establish no rate from Nashville, Tenn., to Louisville, Ky., less than the rates from local points in Kentucky to Louisville, no matter how strenuous the competition at Nashville may be, without either cutting down all its intermediate rates in Kentucky to the same extremely low competitive basis, or getting the consent of the Railroad Commission in Kentucky, clearly the State legislation imposes a direct burden upon interstate commerce and interferes directly with its freedom. Such State legislation would necessarily influence the carrier's conduct to some extent in the management of his business between Nashville, Tenn., and Louisville, Ky., and such commerce would not be free from the restraints imposed by the State of Kentucky. The State legislation thus becomes a regulation which affects the compensation for which such interstate commerce shall be carried.

The examples suggested by this Court in the Illinois case find their parallels here. A citizen of Nashville has tobacco which he desires to have transported by the Railroad Company from that city to Louisville, Ky., and undertakes to make a contract with the Railroad Company for that purpose. But the Railroad Company is not permitted to make a contract at the rate legally established in accordance with the laws of Congress, and at which the Nashville shipper can secure the transportation by other lines, simply because it

may be charging a higher rate in Kentucky. Such shipper would, therefore, either be compelled to pay at the rate of twenty-five cents per hundred pounds, because such rate is required by the law of Kentucky on account of the Railroad Company having received a rate of that amount from a person residing in Kentucky, or he would have to abandon this practicable and desirable route of interstate transportation and employ some other line instead.

If Section 218 is susceptible of the application given to it by the lower court, its operation will be extremely varied, and in every instance its direct effect will be to hamper and, as a rule, to destroy interstate commerce, which is of the greatest value both to the carriers and the public. Nashville, Tenn., and Evansville, Ind., are both important markets, and both upon navigable streams, and there is practicable navigation from one to the other. They are connected by one railroad, extending from Nashville, Tenn., to the Kentucky State line at Guthrie, Ky., and thence north across Kentucky to Henderson, and thence into Indiana to Evansville. No matter how severe may be the competition with boats between Nashville and Evansville, or how desirable it may be to the Railroad Company or beneficial to the public for the Railroad Company to meet such competition, no commodity can be carried by rail from Nashville to Evansville, or Evansville to Nashville, at a rate to meet that competition, unless the Railroad Company is willing to reduce all its rates on the same line between points in Kentucky, which are in no wise affected by such competition, to the same extremely low basis, or unless the Railroad Commission of Kentucky shall authorize the charging of the less rate from Nashville to Evansville, and from Evansville to Nashville. It is not improbable that the Railroad Commission of Kentucky, in a desire to facilitate commerce at Henderson, Kentucky, at the expense of Evansville, would grant permission to charge less from Nashville to Henderson, and from Henderson to Nashville, and withhold such consent with reference to Evansville, although Evansville and Henderson are affected by precisely the same conditions.

Cincinnati derives an important portion of its coal from mines in the State of Kentucky, situated on the lines of the C., N. O. & T. P. and the L. & N. Railroads. On account of the severe competition at Cincinnati with river coal and coal from other places, such coal from Kentucky mines if carried to Cincinnati at all must be carried at extremely low rates, and it is so carried, thus greatly benefiting the Kentucky mines and giving Cincinnati an additional source from which to draw its coal. Yet, under such construction of Section 218, this traffic must be abandoned unless the railroad companies can afford to reduce their rates on coal from those mines to all points in Kentucky on the same lines to the same low basis as the extremely low rates to Cincinnati (which the companies can not do), or unless the Railroad Commission of Kentucky shall permit such lower rates to be charged from the Kentucky coal mines to Cincinnati, Ohio. If the Railroad Commission of Kentucky should desire to facilitate coal trade at Covington and Newport, Ky., and not to encourage such trade at Cin-

cinnati, Ohio, it would quite probably give the consent with reference to Covington and Newport, and withhold it with respect to Cincinnati.

Such examples might be multiplied indefinitely with reference to every railroad passing through the State of Kentucky.

If the lower court's theory be upheld, it can not be restricted to long and short haul laws, but will apply to all regulations on the subject of rates. Section 818, Ky. Stats., prohibits any railroad company giving any locality any undue or unreasonable preference or advantage over any other locality. If the same rate should be charged from Nashville, Tenn., to Louisville, Ky., as is charged from Franklin, Ky., to Louisville, Ky., it might still be contended that Franklin, Ky., was subjected to an undue prejudice because charged the same rate for a shorter distance, and that the Railroad Company must re-adjust its rates to Louisville from Nashville and Franklin, respectively, in order to correct this undue preference.

The agricultural country immediately surrounding Guthrie, Ky., may ship its products to Louisville, Ky., or Memphis, Tenn., over one line of the Railroad Company, or to Evansville, Indiana, or to Nashville, Tenn., over another. The Kentucky courts might in like manner pronounce that the rates on these lines favored Evansville or Nashville or Memphis, or all of them, at the expense of Louisville, and require their re-adjustment under the Kentucky undue preference section, claiming all the time that they were simply exercising their jurisdiction over the rate to Louisville.

Countless instances might be cited on every railroad running through Kentucky where the Kentucky laws could be applied in this way so as to regulate interstate commerce, and in every instance the plea could be maintained, just as well as it can in this case, that the laws of the State are operating only upon the rates within the State, and yet the result in every instance would be a direct burden upon and interference with interstate commerce, practically destroying the freedom of the carrier to make such rates for interstate commerce as are in the interest of that commerce and allowed by the laws of Congress on the subject.

A great deal of traffic passing over long distances in this country must move at phenomenally low rates, which are profitable to the carriers involved only because their expenses would be practically the same whether this additional traffic were picked up or not, but still the traffic is in this sense profitable to the carriers, and is of the very highest value to the public. Yet every such rate might become impossible, notwithstanding any thing Congress might enact to the contrary, if each State through which that traffic passes could so legislate as to enforce any given relation between the rates on such traffic and the rates on traffic purely local to that State.

The policy of Congress not to destroy but to protect legitimate competitive interstate traffic, as manifested in the Interstate Commerce Act, and as pointed out by this Court in numerous cases, notably in Int. Com. Com. v. R. Co., 145 U. S. 263; T. & P. R. Co. v. Int. Com. Com., 162 U. S. 197, and Int. Com. Com. v. Ala. Mid. R'y Co., 168 U. S. 144, could be wholly thwarted by State action if State

laws be given the application which the lower court has given to Sec. 218. Interstate rates, instead of being made in conformity with the principles of the Interstate Commerce Act, and in the legitimate and beneficial development of interstate traffic, would have to be made with reference to the laws of the several States, and in so far as the railroad companies might be unable to make such adjustment of their intra-state rates as would permit them to continue their interstate traffic without violating State laws, they would have to abandon the interstate traffic.

Section 218, as applied by the lower court and all other State laws on the subject of rates applied on the same theory in this way, virtually amounts to a tax upon interstate commerce, or to a penalty for engaging in it. If the lower court has correctly applied the law, the State of Kentucky can say and does say to the Railroad Company: "You may engage in carrying tobacco from Nashville to Louisville, provided that in return for this privilege thus given you you reduce all your rates between points in Kentucky on the same line to Louisville to the same figure. If you can not afford to make this reduction, then you can not engage in the interstate traffic unless the Railroad Commission of Kentucky shall grant permission for you to do so." The State of Kentucky has no power to give or withhold the privilege of engaging in traffic from Nashville, Tenn., to Louisville, Ky. If not, then it has no power to impose any condition or burden as the price of engaging in such traffic, nor can it delegate to its Railroad Commission the power to say when such interstate traffic shall be and when it shall not be carried on.

Suppose the Railroad Company engages in important competitive traffic over the interstate haul from Nashville to Louisville at a very low rate, necessitated by unavoidable competition, the conditions being such that under the Interstate Commerce Act it may lawfully charge higher rates for shorter intermediate non-competitive hauls. On the same principle it charges higher rates for the shorter intermediate non-competitive hauls lying wholly in the State of Kentucky. Those higher rates may be just and reasonable and give the Railroad Company only a fair return on the fair value of its investment. To reduce such rates to the basis of the Nashville-Louisville rate would entail a loss of, say, $50,000 per year. If Section 218 has been correctly applied, it amounts to this: The Railroad Company must raise its interstate rate in obedience to the command of the State of Kentucky; or it must get authority from the Railroad Commission of Kentucky to charge the low interstate rate; or it must forfeit $50,000 per year for engaging in the interstate traffic. Any possible operation of Section 218 is therefore necessarily in conflict with the commerce clause of the Federal Constitution.

The entire separation of intrastate and interstate traffic has been strikingly illustrated by this Court in the case of Smyth v. Ames, 169 U. S. 466, 541, in speaking of the contention that in determining the reasonableness of the rates established by the Nebraska Statute the earnings of the railroads from interstate traffic should be taken into consideration. The Court said:

"In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. *It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business.* The argument that a railroad line is an entirety; that its income goes into and its expenses are provided for out of a common fund, and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

But not only does the lower court's application of Section 218, under a pretense of regulating purely intrastate rates, impose a condition upon which such interstate business shall be enjoyed, and restrict the freedom of such commerce, but it would absolutely destroy the interstate traffic involved in this case and severely competitive interstate traffic generally in the State of Kentucky, except so far as its continued enjoyment might be permitted by the State Railroad Commission. It is a matter of common knowledge that in the Southern States, on account of sparsity of population and the comparatively small amount of traffic, railroad companies can not possibly afford to handle all their local traffic at the extremely low rates which are necessitated at many points by reason of severe competition, due generally to the numerous navigable streams in that section; and if statutes such as that under consideration can have the effect given by the lower court, the result is that this interstate competitive traffic, which is admittedly handled not only without injury to the public, but to the advantage of the public as well as of the carriers, and which it has been repeatedly held is allowed by the Act of Congress, will be absolutely destroyed. Paragraph two of the answer directly alleges that if Section 218 be applied to the case presented, the result would be, not to reduce the rate from Franklin, Kentucky, to Louisville, Kentucky, but to raise the rate from Nashville, Tennessee, to Louisville, Kentucky (which means the destruction of that interstate competitive traffic), unless the Kentucky Railroad Commission shall authorize the maintenance of the interstate

rate at the lower figure. In this case, therefore, and generally in Southern territory, such application of such provisions would make the laws of the State control interstate rates and traffic as completely as if such laws in terms prohibited such traffic, or fixed the rates thereon, or delegated that power to their railroad commissions.

II.

Paragraph four of the answer, after showing that the tobacco traffic from Nashville to Louisville was legitimate competitive traffic carried at as high a rate as the controlling and unavoidable competition at Nashville would allow, and in nowise increasing the rate from Franklin to Louisville, which was just and reasonable in itself and not affected by similar competition, pleads that if Section 218 be so construed as to deny to the Railroad Company the right to engage in such competitive traffic except upon an arbitrary reduction of all intermediate rates to the same basis, or except at the arbitrary will of the Railroad Commission, it would impair the obligation of the Railroad Company's charter contract with the State of Kentucky to engage in legitimate railroad business, subject only to reasonable regulations in the proper exercise of the police power, and would deprive it without due process of law of its liberty to engage in a legitimate branch of railroad business and of a legitimate use of its property.

The court followed the construction of Section 218, which had theretofore been adopted by the Court of Appeals of Kentucky in the two cases of L. & N. R. Co. v. Commonwealth, 20 Ky. Law Rep. 1380, and L. & N. R. Co. v. Commonwealth, 21 Ky. Law Rep. 232, which construed Section 218 as prohibiting carriers to engage in legitimate competitive traffic unless they arbitrarily reduce their intermediate rates, though just and reasonable in themselves, to the same low basis, or unless the Railroad Commission will permit the continued enjoyment of such legitimate competitive traffic, the Court of Appeals expressly holding that the power of the Railroad Commission in the premises is final and conclusive and free from judicial control. As thus construed and enforced, we contend that that section is void, because in contravention of the Federal Constitution in the particulars set out in the fourth paragraph of the answer.

This question is fully presented to this Court in the case of Louisville & Nashville R. Co., plaintiff in error, against Commonwealth of Kentucky, defendant in error, on the present docket of this Court as No. 93, and it is unnecessary to reiterate the argument here. It may be stated briefly that the arbitrary reduction of intermediate rates on the line of the long haul, without making corresponding reductions on other parts of the same railroad where the same conditions apply, and which are therefore entitled to the same rates for equal distances, is directly in conflict with the principle established in Lake Shore R'y Co. v. Smith, 173 U. S. 684; that arbitrary reduction of the intermediate rates in the absence of any investigation as to their reasonableness, and in such a way as to prevent the possibility of

the carriers' invoking judicial inquiry and protection, is directly in conflict with the principle which has been settled ever since the decision of C. M. & St. P. R'y Co. v. Minnesota, 134 U. S. 418, that a carrier is entitled to judicial protection against unreasonably low rates; that if instead of submitting to such arbitrary reduction of the intermediate rates the carrier elects to raise its competitive rates and thereby lose its competitive traffic, such operation of the law is obviously the destruction of a legitimate branch of railroad business, which is not injurious to the public, but is beneficial both to the public and the railroad company, and therefore unconstitutional, and it has been so held in *ex parte* Koehler, 23 Fed. Rep. 529; that to submit the whole matter to the Railroad Commission to decide in the exercise of an arbitrary power whether the Railroad Company shall be relieved of the unconstitutional operation of the section, without prescribing any rule by which the Commission shall be governed, and making the Commission's action final and free from judicial control, makes the section obnoxious to the principle laid down in the case of Yick Wo v. Hopkins, 113 U. S. 356.

The opinions of the Court of Appeals and dissenting opinions in the two cases just referred to will be found in the record and brief in case No. 93. It may be stated that of the seven judges of the Court of Appeals only four concurred in upholding Section 218 as constitutional with the construction above stated, and that Chief Justice Hazelrigg and Judges DuRelle and Burnam dissented on the ground that, so construed, the section was in conflict with the Federal Constitution in the particulars above indicated for the reasons that have just been briefly stated.

III.

With respect to the rate adjustment involved in this case, there would be, even theoretically, only three possible methods of complying with Sec. 218 as applied by the lower court.

1. By raising the rate from Nashville to Louisville. This method of compliance would make the section directly regulate and fix the interstate rate, and the section would, therefore, be admittedly in conflict with the Federal Constitution and with the Interstate Commerce Act.

2. The Railroad Company might apply to the Railroad Commission of Kentucky and get authority to charge the less rate from Nashville to Louisville. It is equally palpable that this would be a regulation of interstate commerce by State authority, and that the section, if it had this effect, would be in conflict with the Federal Constitution and the Interstate Commerce Act.

3. The Railroad Company might reduce its rate from Franklin to Louisville to 12 cents per hundred pounds. The Railroad Company pleaded that its rate from Franklin to Louisville of 25 cents per hundred pounds was only a just and reasonable rate for that service, and set up facts showing that the Nashville rate was an abnormally

low rate, the result of severe competition, and that it could not be taken as a criterion for the rate to Franklin. A demurrer to this paragraph of the defendant's answer was sustained. The Railroad Company was thus denied the right to show that the rate it charged was reasonable, and the rate which would be imposed upon it, if forced to reduce its rate from Franklin to Louisville, would be unreasonably low. This application of Sec. 218 results in fixing abnormally low rates upon carriers for short hauls, and denies to them absolutely any right to show that the rates charged are just and reasonable, or that the rates thus imposed are unreasonably low, and thus the section is in conflict with the Fourteenth Amendment of the Federal Constitution upon the principles settled in the case of Chicago, &c., R'y Co. v. Minnesota, 134 U. S. 418, and recognized ever since that time.

So far as this case is concerned, therefore, any possible application of the section as construed by the lower court puts it in direct and obvious conflict with the Federal Constitution.

But, for the reasons set forth in Section I of this argument, we confidently insist that the section as applied by the lower court is necessarily in conflict with the power of Congress over interstate commerce, even if its effect be to reduce the short haul intrastate rate, since even then it puts a direct burden and penalty upon engaging in interstate traffic.

And for the reasons briefly stated in Section II of the argument and set forth at greater length in the argument for plaintiff in error in L. & N. R. Co. v. Commonwealth, on the present docket of this Court, Section 218, as construed by the Kentucky courts, is an impairment of the Railroad Company's charter contract and in necessary conflict with the Fourteenth Amendment to the Federal Constitution, whether it reduces the short haul rate or destroys the competitive traffic or turns the carrier over to the arbitrary control of the Railroad Commission.

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